



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 744 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

KENYA BUILDING, CONSTRUCTION, TIMBER AND FURNITURE

INDUSTRIES EMPLOYEES UNION.....CLAIMANT

VERSUS

KARTAR SINGH DHUPAR.....RESPONDENT

JUDGMENT

By memorandum of claim dated 3rd May 2012 amended by leave of court on 22nd August 2017, the claimant, a trade union registered under the Labour Relations Act to represent workers in the building and construction, industry avers that its member, Margaret Muthoni (the grievant was unfairly terminated from the employment of the respondent on account of pregnancy. It avers that the grievant was underpaid and further that she was not paid terminal dues upon termination of her employment.

The claimant seeks the following terminal dues on behalf of the grievant –

- a. Payment in lieu of notice, at one month’s salary..... Kshs.11,690
- b. Earned leave for one month at..... Kshs.11,690
- c. Prorata leave at 2.25 x Kshs.450 x 4 months..... Kshs.4,050
- d. Underpayment at Kshs.2,390 x 16 months..... Kshs.38,240
- e. 3 months’ maternity leave pay at 11,690 x 3..... Kshs.35,070

Total Kshs.100,740

The respondent filed a response to the amended memorandum of claim dated 21st September 2018. It denies all the allegations in the amended memorandum of claim.

The suit which had been heard before Nduma J. on 18th May 2017 when the claimant’s testimony was taken and adjourned for hearing of respondent’s witness on 21st September 2019 was heard *de novo* on 2nd April 2019 and 30th May 2019. The grievant testified in support of her claim while the respondent called one Narendra Singh. The parties thereafter filed and exchanged written submissions.

Claimant’s Case

In her testimony the grievant testified that she was employed by the respondent as a store keeper from the 2009 but was not issued with a letter of appointment. Her salary was initially Kshs.6,000/= but was later increased to Kshs.7,000/= per month. She worked at a construction site on Denis Pritt Road, Nairobi until 14th November 2010.

On that date she sought permission to attend her grandmother’s funeral but Mr. Nilma who was in charge of the site refused to grant her permission to attend the funeral at Kiambu. Being a Saturday when they worked up to 1.00 pm, the grievant arranged with the foreman, a Mr.

Dindi to release her at 12.00 pm so that she could attend the funeral.

Upon her reporting back on 15th November 2010, which was a Tuesday, the foreman informed her that Mr. Nilma said she should stay at home until she gave birth as her pregnancy was interfering with her work. She asked for her salary and was told by Mr. Nilma through the foreman, that she would be paid when she resumed duty.

The grievant testified that she reported to the union that she had been sacked without pay. When she visited the site with a representative from the union, Mr. Nilma denied that she was even an employee of the respondent. The union reported a dispute to the Minister for Labour but the respondent failed to attend all conciliation meetings.

The grievant testified that she delivered on 8th January 2011. When she reported back to work after 3 months, Mr. Nilma told her that he had employed someone else and there was no vacancy for her. She was also not paid any terminal dues.

The grievant testified that she did not go on annual leave during the period she worked for the respondent from July 2009 to November 2010. She testified that she called Mr. Nilma after the case was filed and he offered to settle the claim by payment of Kshs.10,000/= provided the grievant withdrew her claim but the offer was rejected by the grievant. She further testified that the respondent's counsel offered to settle the claim out of court three times after that but there was no agreement.

She prayed for judgment as prayed in her memorandum of claim.

Under cross examination, the grievant stated she was employed by Kartar Singh Dhupar Company and not an individual. She reiterated that she was not issued with a letter of appointment, and she did not ask for it. That she was paid monthly and signed on a salary voucher but was not given a copy of the voucher. She further stated that Nilma was aware that she was pregnant as it was obvious.

Respondent's Case

MR. NARENDRA SINGH, RW1 testified that he works for Kartar Singh Dhupar and Company Limited. That Kartar Singh Dhupar is his father but does not work in the company as he is sickly and paralysed, and left Kenya in 2010 to live in India.

Mr. Singh testified that he does not know Margaret Muthoni, the grievant but has heard about her. He testified that he works at sites and that the company has many different construction sites.

Under cross examination RW1 stated that he did not file a copy of the certificate of incorporation of the company and that the only word missing from the title of the company is "*Limited*". He reiterated that he does not know the grievant as the respondent has construction sites all over Kenya and the grievant did not state which site she worked in. He further stated he did not file the records of employees in the respondent's employment at the material time.

Determination

I have considered the pleadings and evidence on record. The issues for determination are the following –

1. Whether the claimant was unfairly terminated by the respondent on account of pregnancy.
2. Whether the claimant is entitled to the prayers sought.
3. The applicable law.

I will start with preliminary issues raised by the respondent. These are the applicable law, the name of the respondent as sued and question of documentation.

From the outset, it is important to point out that the respondent did not either in the pleadings or in the evidence of RW1 specifically deny that the grievant was its employee. All that RW1 stated is that he personally did not know the grievant or the site she worked in as this was not pleaded in the claim or amended claim.

RW1 further testified that if the grievant worked with the respondent she ought to have a company card. The grievant had however testified that she was not issued with any employment records and the respondent did not provide any proof that it issued employment cards to its employees.

Section 9(3) of the Employment Act provides that it is the duty of the employer to issue a written contract to its employee. Section 10(2) and (3) provides for the particulars to be included in employment contract while Section 10(6) requires the employer to keep records of the particulars of employment for at least 5 years from the date of termination of employment. Section 10(7) provides that in legal proceedings where an employer fails to produce employment records it shall be the burden of the employer to disprove the averments in respect of the said particulars as alleged by an employee.

In this case therefore it was the responsibility of the respondent to prove by way of production of employment records that the claimant was not its employee, which burden the respondent failed to discharge.

I thus find from the foregoing that the respondent neither denied nor proved that the grievant was not its employees.

The second issue is the name of the respondent as sued. The respondent submitted in detail that the person sued is not the one who employed the grievant. RW1 however in this testimony stated that Kartar Singh Dhupar is the name of his father and that the only word missing from the name of the respondent is “*Limited*”. He further admitted that he had not filed any records to prove that the company’s name is not as given in the claim.

The Employment Act defines an employer in very wide terms to include –

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

At paragraph 2 of the claim and the amended claim the respondent is described as –

“The respondent is a duly incorporated company in the business of building and construction within the republic of Kenya (service of summons shall be effected through the claimant’s office.)”

In view of the provisions of Article 159(2) of the Constitution 2010,

Section 20(1) of the Employment and Labour Relations Court Act and the definition of employer in both the Employment Act and the claim and amended claim herein, I find that the respondent is well aware that it is the company that was sued and not the father of RW1. I therefore find that the argument by the respondent is a mere technicality and cannot be used to defeat substantive justice.

The final preliminary issue is the applicable law. The respondent has submitted elaborately that the Regulation of Wages (Building Construction Industry) Order, 2004 is repealed. This is not the correct position. Section 63(1) and (2) of the Labour Institutions Act and Section 64 thereof provides as follows –

63. Repeal of Cap. 229, transitional and savings provision.

1. The Regulation of Wages and Conditions of Employment Act is repealed.

2. Any regulation or other instrument made or issued under the Regulation of Wages and Conditions of Employment Act shall continue to have effect as if such regulation or other instrument were made or issued under this Act.

64. Existing laws

Any written law relating to the regulation of labour matters shall have effect subject to modification as may be necessary to give effect to this Act, and where the provisions of any law conflict with the provisions of this Act, the provisions of this Act shall prevail.

It is therefore clear that the Regulations of Wages (Building Construction Industry) Order, 2004 is still in force as has been amended from time to time the latest being “*The Labour Institutions (Building and Construction Industry) (Wage) Order, 2012*” under Legal Notice no. 20 of February 2012 and dated 3rd January 2013.

Back to the substantive issues for determination, the respondent did not specifically deny that the grievant was terminated from employment in the manner stated in her testimony. The claimant specifically named the person who sent her home on grounds of pregnancy. There was no denial that Mr. Nilma worked with the respondent or that he specifically worked with the grievant at the Denis Pritt Site. There was no evidence that the respondent did not have a site on Denis Pritt Road at the material time as per testimony of the grievant. The grievant further gave the name of the foreman who was present at the time. Again no evidence was adduced by the respondent to deny the grievant’s evidence in that respect.

Section 47(5) of the Employment Act provides that –

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

I find that the respondent has not discharged its burden of proof under Section 47(5) with the result that the court adopts the position of the claimant that she was dismissed from employment on grounds of pregnancy in line with the provisions of Section 10(6) and (7) of the Act.

The averment by the respondent at paragraph 5 of the response to amended claim to the effect that “... *the respondent is not a medical doctor and has no capability to determine the matter pleaded therein*” is to say the least, absurd. In the first place neither Mr. Nilma nor the foreman Mr. Dindi were called to testify that they were not aware that the grievant was pregnant. Secondly, the grievant herself testified that the pregnancy was obvious for all to see, evidence that was not rebutted by the respondent.

For the foregoing reasons, I find that the grievant’s employment was terminated on grounds of pregnancy. The termination was thus unfair

in terms of Section 46(a) of the Employment Act which provides that termination of employment of a female employee on grounds of the employee's pregnancy or any reason connected with her pregnancy constitutes unfair termination.

Further Section 5(3) of the Employment Act also provides that termination on grounds of pregnancy constitutes discrimination.

For the foregoing reasons I find that the termination of the grievant's employment was both unfair and discriminatory.

Remedies

According to the Regulation of Wages (Building and Construction Industry) Order, the grievant was entitled to a monthly salary of Kshs.10,390 and house allowance of Kshs.1,300 making a total of Kshs.11,690 per month. She is entitled to pay in lieu of notice which I award her at **Kshs.11,690**.

She is also entitled to underpayments but only for the 16 months she worked from July 2009 to November 2010 (Kshs.(11,690 – 7,000) – (4,690 x 16) = **Kshs.75,040** which I award her.

Having found the termination of the grievant's employment both unfair and discriminatory, I award her both compensation for unfair termination and damages for discrimination which I assess and consolidate at 12 months' salary being **Kshs.140,280**.

The prayer for maternity leave is rejected as the grievant testified that she left employment on 11th November 2010 and gave birth in 8th January 2011, after the termination of employment.

The grievant is further entitled to leave for the 16 months worked at two and a quarter days per month (or 26 days per annum) as provided at paragraph 8 of the Regulation of Wages (Building and Construction Industry) Order. I thus award her 36 days leave based on basic salary of Kshs.10,390, I award her **Kshs.14,386**.

Total award is Kshs.241,396.00

The respondent shall pay claimant's costs of the suit. Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE